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Annette W. Jarvis, Utah Bar No. 1649
 Steven C. Strong, Utah Bar No. 6340
 RAY QUINNEY & NEBEKER P.C.
 36 South State Street, Suite 1400
 P.O. Box 45385
 Salt Lake City, Utah 84145-0385
 Telephone: (801) 532-1500
 Facsimile: (801) 532-7543
 Email: ajarvis@rqn.com

Lenard E. Schwartz, Nevada Bar No. 0399
 Jeanette E. McPherson, Nevada Bar No. 5423
 SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Telephone: (702) 228-7590
 Facsimile: (702) 892-0122
 E-Mail: bkfilings@s-mlaw.com

Attorneys for Debtors and Debtors-in-Possession

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

Chapter 11

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED FUND,
 LLC,
 Debtor.

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

**REPLY MEMORANDUM IN SUPPORT
 OF MOTION FOR ORDER APPROVING
 RETENTION PLAN OF DEBTOR'S
 REMAINING EMPLOYEES**

**(AFFECTS USA COMMERCIAL
 MORTGAGE COMPANY)**

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Date: October 19, 2006
 Time: 9:30 a.m.

SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Tel: (702) 228-7590 · Fax: (702) 892-0122

USA Commercial Mortgage Company (“USACM”) hereby submits this Reply Memorandum in Support of Motion for Order Approving Retention Plan of Debtor’s Remaining Employees (the “Motion”) (docket no. 1429).

STATEMENT OF FACTS

1. USACM filed the Motion on October 3, 2006, seeking approval of a retention plan (the “Retention Plan”) to encourage USACM’s remaining eleven (11) employees to stay with USACM through confirmation of a plan of reorganization.

2. On October 6, 2006, the Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the “FTDF Committee”) filed its response to the Motion (docket no. 1470) in which it indicated that it had no objection to the Motion as long as the Retention Plan was funded by USACM’s estate and not by USA Capital First Trust Deed Fund, LLC.

3. On October 12, 2006, the United States Trustee (the “UST”) filed an opposition to the Motion (docket no. 1520) in which the UST objected to the approval of the Retention Plan on the grounds that: (a) funds from the Collection Account could not be used to fund the Retention Plan; (b) 11 U.S.C. § 503(c) is the statutory section that applies to the Motion; and (c) approval allegedly is not justified by the facts and circumstances of this case.

4. On October 13, 2006, a group of direct lenders known as the “JV Direct Lenders” joined in the opposition (docket no. 1537) filed by the UST but did not advance any new arguments.

5. USACM files this reply memorandum to respond to the arguments raised by the UST and to support the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

A. The Opposition of the UST, as Joined by the JV Direct Lenders, Lacks Merit Because the Facts and Circumstances of This Case Justify Approval of the Retention Plan.

First, the UST objects to the Motion on the ground that it is silent as to the source of funds that will be used to fund the Retention Plan, and that the funds in the Collection Account should

not be used to fund the Retention Plan. USACM's own funds in its operating account will be used to fund the Retention Plan, just as USACM's own funds are being used to pay employees' ordinary salaries and benefits. Except for servicing fees and other costs and fees USACM is entitled under the loan servicing agreements or by Court order to transfer to its operating account, funds in the Collection Account are not being used and will not be used in these cases to pay USACM's overhead and administrative expenses. Funds held in the Collection Account will not be used to fund the Retention Plan, nor will any funds be used from the estate of USA Capital First Trust Deed Fund, LLC to fund the Retention Plan.

Second, the UST objects to USACM's contention that 11 U.S.C. § 503(c) does not apply in this case, and instead argues that 11 U.S.C. § 503(c)(3) does apply. As a clarification, USACM should have stated more precisely in its Motion that Sections 503(c)(1) and 503(c)(2) do not apply in this case because none of the remaining eleven (11) employees are "insiders" of USACM as that term is defined in the Bankruptcy Code. USACM does not dispute that the approval of the funding of the Retention Plan is outside of the ordinary course of business and that the facts and circumstances of this case must justify the approval of the Retention Plan under 11 U.S.C. § 363(b) and/or 11 U.S.C. § 503(c)(3). USACM contends that the facts and circumstances of this case do justify the approval of the Retention Plan, as set forth in the Motion and the Declaration of Thomas J. Allison filed in support of the Motion.

Third, the UST objects to the Motion on the ground that the UST does not believe that the facts and circumstances of this case justify the approval of the Retention Plan, and the UST outlines three reasons as support for this contention. First, the UST argues that the pre-petition actions of USACM caused the Debtors' creditors to suffer significant losses, and because of the magnitude of those losses, USACM should not be requesting approval of additional incentives for its employees. Second, the UST argues that if the Retention Plan is approved, the extra money required to fund the Retention Plan will not be available to pay the pre-petition claims of creditors. Third, the UST argues that the proposed incentives are in addition to the employees' existing ordinary salaries and that the additional amounts should not be paid to employees of the business that caused the creditors of the Debtors to suffer their losses in the first place.

1 In making the foregoing arguments, the UST misapprehends the necessity and reasons for
2 the Retention Plan. USACM is not seeking approval of the Retention Plan in order to provide a
3 windfall to the eleven remaining employees of USACM in the form of bonuses and other
4 incentives. Rather, the goal of USACM's current management has been and will continue to be to
5 maximize the recovery for creditors and other stakeholders of the Debtors' estates, and a critical
6 part of achieving that goal is to keep the current skeleton staff of employees in place so that
7 USACM's business operations can continue to run as smoothly as possible for the next few
8 months while the Debtors' business affairs are wound up and current management works toward
9 the confirmation of a plan of reorganization. If the remaining employees choose to leave USACM
10 at this critical time for more steady employment, and take with them their institutional knowledge
11 of the USACM's business operations, this will make running the USACM's business much more
12 difficult and expensive to the detriment of creditors.

13 To the extent USACM's creditors ultimately receive less than a full recovery on their pre-
14 petition claims, those losses were not caused by the eleven remaining employees of USACM, but
15 rather by the Debtors' pre-petition management which has been removed and which will not
16 benefit in any way from the Retention Plan.

17 Moreover, USACM's current management believes that approving the Retention Plan will
18 actually save money in the long run. The UST appears to wrongly assume that if the Retention
19 Plan is not approved, the remaining employees of USACM will be happy to continue working for
20 the company through the effective date of a plan of reorganization without any additional
21 compensation for their very tenuous employment status. There is no support for this unrealistic
22 assumption. If the additional incentives are not approved, the remaining employees of USACM
23 have indicated they will leave USACM for other employment, which is not surprising given that
24 they have no prospect of long term employment with USACM and therefore have no reason to
25 stay absent some incentive to do so. Losing the few remaining current employees will be much
26 more costly to USACM's estate because current management will then have no recourse but to
27 employ other individuals and/or consultants whose billing rates undoubtedly will be much higher
28 than what is proposed to be paid to the remaining employees under the Retention Plan.

1 Accordingly, approval of the Retention Plan will save money in the long run, and therefore, is
2 justified under the facts and circumstances of this case and is for the benefit of creditors of
3 USACM's estate.

4 **CONCLUSION**

5 Based upon the foregoing, as well as the arguments set forth in its original memorandum,
6 USACM requests that the Court grant the Motion.

7 Dated this _____ day of October, 2006.

8
9 Annette W. Jarvis, Utah Bar No. 1649
10 Steven C. Strong, Utah Bar No. 6340
11 RAY QUINNEY & NEBEKER P.C.
12 36 South State Street, Suite 1400
13 P.O. Box 45385
14 Salt Lake City, Utah 84145-0385
15 and

16 /s/ Jeanette E. McPherson

17 Lenard E. Schwartz, Nevada Bar No. 0399
18 Jeanette E. McPherson, Esq., Nevada Bar No. 5423
19 SCHWARTZER & MCPHERSON LAW FIRM
20 2850 South Jones Boulevard, Suite 1
21 Las Vegas NV 89146
22 Attorneys for Debtors and Debtors-in-Possession
23
24
25
26
27
28

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SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

CERTIFICATE OF SERVICE

1. On October 18, 2006, I served the following document(s):

a. **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER APPROVING
RETENTION PLAN OF DEBTOR'S REMAINING EMPLOYEES(AFFECTS USA
COMMERCIAL MORTGAGE COMPANY)**

2. I served the above-named document(s) by the following means to the persons as listed below:

☒ a. **By ECF System:**

FRANKLIN C. ADAMS franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com

NANCY L ALLF nallf@parsonsbehle.com,
klawrence@parsonsbehle.com;tthomas@parsonsbehle.com;ecf@parsonsbehle.com

OGONNA M. ATAMOH oatamoh@nevadafirm.com,
bkecf@nevadafirm.com;paltstatt@nevadafirm.com;sliberio@nevadafirm.com

KERIANN M ATENCIO ATENCIOK@GTLAW.COM

BMC GROUP, INC. evrato@bmcgroup.com,
ecf@bmcgroup.com;jmiller@bmcgroup.com;jbartlett@bmcgroup.com

KELLY J. BRINKMAN kbrinkman@gouldpatterson.com

THOMAS R BROOKSBANK tom@tombrooksbank.com, renee@tombrooksbank.com

ANDREW M. BRUMBY abrumby@shutts-law! .com, rhicks@shutts-law.com;lmackson@shutts-law.com

MATTHEW Q. CALLISTER mqc@callister-reynolds.com, maggie@callister-reynolds.com

CANDACE C CARLYON ltreadway@sheacarlyon.com,
ccarlyon@sheacarlyon.com;bankruptcyfilings@sheacarlyon.com;rmsmith@sheacarlyon.com

ROB CHARLES rcharles@lrlaw.com, cjordan@lrlaw.com

MICHAEL W. CHEN yvette@ccfirm.com

KEVIN B. CHRISTENSEN kbchrislaw@aol.com

JANET L. CHUBB tbw@jonesvargas.com

JEFFREY A. COGAN jeffrey@jeffreycogan.com, sarah@jeffreycogan.com

WILLIAM D COPE cope_guerra@yahoo.com

CICI CUNNINGHAM bankruptcy@rocgd.com

SCHWARTZ & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

SCHWARTZ & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Tel: (702) 228-7590 · Fax: (702) 892-0122

1 LA UREL E. DAVIS bklsclv@lionelsawyer.com,
 ldavis@lionelsawyer.com;gbagley@lionelsawyer.com;ldavisesq@aol.com
 2
 3 DEBT ACQUISITION COMPANY OF AMERICA V, LLC (tf) tfette@daca4.com
 4 THOMAS H. FELL BANKRUPTCYNOTICES@GORDONSILVER.COM
 5 SCOTT D. FLEMING sfleming@halelane.com, dbergsing@halelane.com,ecfvegas@halelane.com
 6 GREGORY E GARMAN bankruptcynotices@gordonsilver.com
 7 WADE B. GOCHNOUR wgochnour@hwmlvlaw.com, donnat@hwmlvlaw.com
 8 CARLOS A. GONZALEZ carlos.gonzalez2@usdoj.gov,
 Darlene.Ruckard@usdoj.gov;Eunice.Jones@usdoj.gov;Sue.Knight@usdoj.gov
 9 GERALD M GORDON bankruptcynotices@gordonsilver.com
 10 R. VAUGHN GOURLEY vgourley@lvcm.com
 11 TALITHA B. GRAY bankruptcynotices@gordonsilver.com
 12 JAMES D. GREENE bknotice@schrecklaw.com
 13 MARJORIE A. GUYMON bankruptcy@goldguylaw.com, ddias@goldguylaw.com
 14 JEFFREY R. HALL jhall@sheacarlyon.com,
 15 bankruptcyfilings@sheacarlyon.com;aboeimer@sheacarlyon.com;ltreadway@sheacarlyon.com;rsmith@sh
 16 eacarlyon.com
 17 XANNA R. HARDMAN xanna.hardman@gmail.com
 18 STEPHEN R HARRIS noticesbh&p@renolaw.biz
 19 BRIGID M. HIGGINS bankruptcynotices@gordonsilver.com
 20 DAVID W. HUSTON dwh@hustonlaw.net, swaits@hustonlaw.net
 21 CHRISTOPHER D JAIME cjai! me@walth erkey.com, kbernar@waltherkey.com
 22 EVAN L. JAMES ejameslv@earthlink.net, kbchrislaw@aol.com
 23 TY E. KEHOE TyKehoeLaw@aol.com
 24 ROBERT R. KINAS rkinas@swlaw.com,
 25 mstrand@swlaw.com;jlustig@swlaw.com;chaines@swlaw.com;imccord@swlaw.com
 26 ZACHARIAH LARSON ecf@lslawnv.com
 27 JOHN J. LAXAGUE jlaxague@canecclark.com
 28 GEORGE C LAZAR glazar@foxjohns.com, gclazar@sbcglobal.net

SCHWARTZ & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

1 NILE LEATHAM nleatham@klnevada.com, ckishi@klnevada.com;bankruptcy@klnevada.com
2 ROBERT C. LEPOME robert@robertlepome.com, susan@robertlepome.com
3 ANNE M. LORADITCH ! ecffilings@beckleylaw.com,
4 aloraditch@beckleylaw.com;pkois@beckleylaw.com
5 REGINA M. MCCONNELL rmccconnell@kssattorneys.com
6 WILLIAM L. MCGIMSEY lawoffices601@lvcoxmail.com
7 RICHARD MCKNIGHT mcknightlaw@cox.net, gkopang@lawlasvegas.com;cburke@lawlasvegas.com
8 SHAWN W MILLER bankruptcyfilings@sheacarlyon.com,
9 smiller@sheacarlyon.com;aboehmer@sheacarlyon.com;ltreadway@sheacarlyon.com
10 DAVID MINCIN mcknightlaw@cox.net,
11 gkopang@lawlasvegas.com;dmincin@lawlasvegas.com,cburke@lawlasvegas.com
12 JOHN F MURTHA jmurtha@woodburnandwedge.com!
13 ERVEN T. NELSON erv@rlbolick.com, susan@rlbolick.com
14 VICTORIA L NELSON bkecf@nevadafirm.com,
15 vnelson@nevadafirm.com;paltstatt@nevadafirm.com;holley@nevadafirm.com;sliberio@nevadafirm.com
16 BOB L. OLSON ecffilings@beckleylaw.com, bolson@beckleylaw.com;dgriffis@beckleylaw.com
17 DONNA M. OSBORN ebaker@marquisaurbach.com,
18 dosborn@marquisaurbach.com;tszostek@marquisaurbach.com;kgallegos@MarquisAurbach.com
19 ANDREW M. PARLEN aparlen@stutman.com
20 DONALD T. POLEDNAK sandplegal@yahoo.com, spbankruptcy@yahoo.com
21 PAUL C RAY info@johnpeterlee.com
22 SUSAN WILLIAMS SCANN sscann@deanerlaw.com, pale! xander@deanerlaw.com
23 JAMES PATRICK SHEA bankruptcyfilings@sheacarlyon.com,
24 ltreadway@sheacarlyon.com;rsmith@sheacarlyon.com
25 SHLOMO S. SHERMAN ssherman@sheacarlyon.com,
26 aboehmer@sheacarlyon.com;bankruptcyfilings@sheacarlyon.com;ltreadway@sheacarlyon.com;rsmith@sh
27 eacarlyon.com
28 AMBRISH S. SIDHU ecf@lslawnv.com
JEFFREY G. SLOANE gjklepel@yahoo.com, rmccconnell@kssattorneys.com
DAVID A. STEPHENS dstephens@lvcm.com

SCHWARTZ & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Tel: (702) 228-7590 · Fax: (702) 892-0122

PETER SUSI cheryl@msmlaw.com, msm@msmlaw.com
 JEFFREY R. SYLVESTER jeff@sylvesterpolednak.com, David@sylvesterpolednak.c! om
 CARYN S. TIJSSELING ! &n bsp cst@beesleymatteoni.com, aha@beesleymatteoni.com
 AMY N TIRRE atirre@kkbrf.com, ksim@kkbrf.com;lleverett@kkbrf.com
 U.S. TRUSTEE - LV - 11 USTPRegion17.lv.ecf@usdoj.gov
 GREGORY J. WALCH GWalch@Nevadafirm.com
 WHITNEY B. WARNICK wbw@albrightstoddard.com, bstessel@albrightstoddard.com
 JOAN C WRIGHT jwright@allisonmackenzie.com, jbrooks@allisonmackenzie.com
 MATTHEW C. ZIRZOW bankruptcynotices@gordonsilver.com

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☐ f. **By messenger**

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a messenger for service.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on: October 18, 2006

LIA DORSEY

(Name of Declarant)

/s/ LIA DORSEY

(Signature of Declarant)